

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE)
SUBSTANTIAL DEVELOPMENT PERMIT)
GRANTED BY WHATCOM COUNTY TO)
RON MACE,)
PATRICK H. and PATRICIA M.)
ALESSE and J. RICHARD HANSEN,)
Appellants,)
v.)
WHATCOM COUNTY and RON MACE,)
Respondents.)

SHB Nos. 83-15 and 83-16
FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the request for review of a shoreline substantial development permit granted by Whatcom County to Ron Mace, came on for hearing before the Shorelines Hearings Board, Rodney Kerslake, Nancy Burnett and Larry Faulk convened at Bellingham, Washington, on June 27, 1983, and convened at Seattle, Washington, on June 30, 1983. Administrative Law Judge William A. Harrison presided.

Appellants appeared and represented themselves. Respondent Ron

1 Mace appeared by his attorney Craig Hayes. Respondent Whatcom County
2 appeared by Bruce L. Disend, Deputy Prosecuting Attorney. Reporter
3 Bibiana D. Carter recorded the proceedings.

4 Witnesses were sworn and testified. Exhibits were examined. From
5 testimony heard or read and exhibits examined, the Shorelines Hearings
6 Board makes these

7 FINDINGS OF FACT

8 I

9 This case concerns a waterfront site on Birch Bay in Whatcom
10 County. Until relatively recent times it was the site of a carnival
11 and amusement area catering to Birch Bay's many summer visitors.
12 Specifically, the site lies north of Alderson Road which, running
13 west, ends at the north-south shore of the Bay.

14 II

15 During 1979, whatcom County granted to a group of investors a
16 shoreline substantial development permit to construct four tri-plex
17 condominiums (12 units) and a year-round restaurant on the site. A
18 shoreline variance, necessary for the restaurant, was also granted.

19 III

20 The restaurant represented a mandatory concession for public
21 access without which the 12 condominium units would probably not have
22 been approved by Whatcom County.

23 IV

24 Birch Bay is a favorite summer recreation area. But it has few
25 year-around residents. A year-around restaurant as required by the

26 FINAL FINDINGS OF FACT,
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1 1979 shoreline permit would face difficulty in surviving economically.

2 V

3 The 12 condominium units were built to completion by the investors
4 without beginning the restaurant. Third party buyers sought to occupy
5 the units. In the press of this situation, Whatcom County required
6 the investors to covenant that the restaurant would be built in
7 exchange for occupancy permits for the condominium units.

8 VI

9 Contemporaneously, one of the investors, Ron Mace, negotiated with
10 the others and acquired sole interest in the portion of the site where
11 the restaurant would be constructed. There is testimony in this
12 record that the covenant to build a restaurant was given to Whatcom
13 County by the selling investors after the restaurant site was sold to
14 Mr. Mace.

15 VII

16 In 1982, Mr. Mace applied to Whatcom County for a new shoreline
17 substantial development permit for two tri-plex condominiums (6 units)
18 on the restaurant site. Mr. Mace also proposes to open to the public
19 a) all tidelands adjacent to the site which he may own and b) a
20 pathway 10 feet in width immediately upland of the ordinary high water
21 mark and running adjacent to it (laterally across the site).

22 VIII

23 Mr. Mace proposes to improve the end of Alderson Road for use as a
24 waterfront public park. These improvements include walkways, trees,
25 and plumbing for public restrooms. The end of Alderson Road is

1 presently unpaved and unimproved. There is nothing there presently to
2 welcome or attract the tourist or day visitor.

3 IX

4 Whatcom County approved a shoreline permit for Mr Mace's
5 park-condominium proposal. In doing so it specified that prior to
6 issuance of a building permit for the condominium units:

7 The applicant shall complete construction of the
8 street end park and required improvements to the
9 Terrell Creek pathway system to the satisfaction of
the Building and Code Director and the County Parks
Director.

10 This approval is embodied in the Decision of the Whatcom County
11 Hearing Examiner dated February 15, 1983, of which we take official
12 notice.

13 X

14 Mr. and Mrs. Alesse own a summertime business consisting of a
15 restaurant and candy-making shop landward of the proposed development.
16 Mr. Hansen is a year-around resident of Birch Bay. These persons have
17 requested review of Mr. Mace's shoreline permit.

18 XI

19 Any Conclusion of Law which is deemed a Finding of Fact is hereby
20 adopted as such.

21 From these Findings of Fact the Board comes to these

22 CONCLUSIONS OF LAW

23 I

24 We review the proposed development for consistency with the master
25 program and Shoreline Management Act. RCW 90.58.140(2).

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II

The Whatcom County Shoreline Master Program (WCSMP) designates the site as "Urban Resort Area." This is defined as an area developed with residential and commercial uses. WCSMP Sec. 3.4.2(a). It is the policy, within this designation, that physical and visual access to shorelines for the public should be strongly encouraged and planned for. WCSMP Sec. 3.4.2(d)(ii). The proposed residential condominium units and public park are consistent with these provisions of the master program.

III

The site is a shoreline of statewide significance. RCW 90.58.020(3)(ii)(B) and -(vi). The proposal is consistent with the preferred uses for such shorelines stated at RCW 90.58.020. In particular the proposal would recognize and protect statewide interest over local interest by welcoming tourists to the shores of Birch Bay. It increases public access and enjoyment of the publicly owned areas of the shoreline. It increases recreational opportunities for the public. The proposal is consistent with the statutory use preferences for shorelines of statewide significance, and is also consistent with the corresponding master program provisions cited by appellants.

IV

The proposed condominiums are not water dependent. However, the Shoreline Management Act does "not call for mandatory water-dependent uses; to the contrary, it allows non-water-dependent uses which permit public enjoyment of the shorelines." Department of Ecology v. New

1 England Fish Co., SHB No. 158. The proposed development, as a whole,
2 facilitates public access to shorelines of the state.

3 V

4 The Board does not condone piecemeal issuance of shoreline permits
5 resulting in the diminution of public access that was the basis for
6 something already built. See Gislason v. Town of Friday Harbor, SHB
7 No. 81-22. In this case, however, the applicant and Whatcom County
8 have mutually shifted from one form of public access, a restaurant, to
9 another, a public waterfront park. The change continues to serve the
10 goal of public access and is consistent with the Shorelines Management
11 Act, provided that the following conditions are reserved in the
12 shoreline permit in addition to those set down by the Whatcom County
13 Hearing Examiner in his decision of February 15, 1983:

- 14 1. A 10-foot wide pathway parallel, adjacent to and
15 upland of the ordinary high water mark shall be open
to the public.
- 16 2. All tidelands adjacent to the site shall be open
17 to the public.
- 18 3. The public shall be notified of the above two
conditions by appropriate signs.
- 19 4. This permit shall be recorded with the Auditor of
20 Whatcom County in a manner which will inform
prospective buyers of its terms.

21 VI

22 Any Finding of Fact which is deemed a Conclusion of Law is hereby
23 adopted as such.

24 From these Conclusions the Board enters this
25

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ORDER

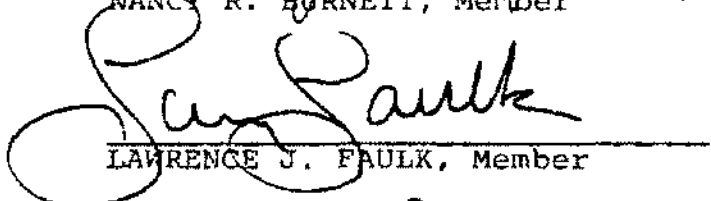
This matter is remanded to respondent Whatcom County with instructions to issue a substantial development permit with the conditions contained in the Decision of Whatcom County Hearing Examiner dated February 15, 1983, and with the conditions set out in Conclusion of Law V, above.

DATED this 14th day of September, 1983.


SHORELINES HEARINGS BOARD


RODNEY M. KERSLAKE, Member


NANCY R. BURNETT, Member


LAWRENCE J. FAULK, Member


BERYL ROBISON, Member


WILLIAM A. HARRISON
Administrative Law Judge